Nos. 81-31, 81-228 and 81-455

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IN THE

Supreme Court of the United States

October Term, 1981

CALIFORNIA, *et al.*,
Appellants,

v.

GRACE BRETHREN CHURCH, *et al.*,
Appellees.

UNITED STATES, *et al.*,
Appellants,

v.

GRACE BRETHREN CHURCH, *et al.*,
Appellees.

GRACE BRETHREN CHURCH, *et al.*,
Cross-Appellants,

v.

UNITED STATES, *et al.*,
Cross-Appellees.

On Appeals from the United States District Court for the Central District of California

BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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INTEREST OF THE AMICUS

This brief amicus curiae is submitted with the consent of the parties by the American Jewish Congress, a membership organization of American Jews founded in 1918 which seeks to protect the religious, political and economic rights of Jews and to promote the principles of democracy. The AJCongress is committed to the great unitary freedoms secured by the Establishment and Free Exercise Clauses of the Constitution. Because this case presents an important application of those guarantees, the American Jewish Congress is filing this brief.

STATEMENT OF THE CASE

A number of California churches, church-operated schools and independent religious schools brought suit to challenge the coverage of their school employees under the federal-state unemployment compensation scheme. They claimed that the employees of the private schools which they operated were excluded from the system under the terms of the Federal Unemployment Tax Act, 26 U.S.C. § 3309(b)(1) and parallel state law.* Section 3309(b) provides, in pertinent part:

> This section shall not apply to service performed —
>
> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or

* Cal. Unemp. Ins. Code § 634.5(a) (West Supp. 1981).

> principally supported by a church or convention or association of churches...

Alternatively, they claimed that, if their school employees were covered, that coverage violated the Establishment and Free Exercise Clauses of the First Amendment and the Constitution's Equal Protection guarantees.

The district court, after determining that it had jurisdiction of the case, ruled that schools that were either part of the corporate structure of a church (Category I schools) or directly affiliated with a church (Category II schools) were excluded from coverage under

26 U.S.C. § 3309(b)(1). The court further held that religious schools which were not controlled by a church or by a convention or association of churches (Category III schools) were not excluded from coverage under the terms of the statute and that their coverage did not violate the Free Exercise rights of the schools, their teachers, or the parents of children attending the schools. The district court rejected the plaintiffs' claim that the required record keeping and state supervision of that record keeping would amount to excessive entanglement. The court, however, ruled that the process of determining entitlement to unemployment compensation benefits for discharged employees of those schools would give rise

to excessive entanglement. Accordingly, it held that coverage of those schools' employees was barred by the Constitution.

Having so concluded, the district court found it unnecessary to rule on the Category III schools' claim that the extension of unemployment compensation tax coverage to them arbitrarily discriminated against religious schools without church affiliation and in favor of religious schools controlled and operated, directly or indirectly, by institutionalized religious sects or denominations, in violation of the Equal Protection Clause. Noting that the evidence demonstrated a "basic similarity" between the independent fundamentalist schools and the church-controlled schools in the case, and

stating that those schools are "virtually indistinguishable" in religious mission, the court concluded:

> By classifying schools according to formal church affiliation, rather than religious mission and curriculum content, and by subjecting non-church-affiliated schools to a financial burden from which church-affiliated schools are exempt, Congress and the California legislature have accorded different treatment to religious organizations which may well have equal status under the First Amendment.

These appeals followed. The federal parties argue on appeal, as they did below, that the district court erred in determining that it had jurisdiction of the case. Nevertheless, they urge this Court to reach the merits. Further, the

federal (and state) parties do not contest the district court's ruling as to the non-coverage of Category I schools, recognizing that the correctness of that ruling was established by this Court's recent decision in St. Martin Evangelical Lutheran Church v. South Dakota, 101 S. Ct. 2142 (1981). Nor do they appeal the ruling holding Category II schools exempt. They, and the state parties, do argue, however, that the court below erred in concluding that the statute's coverage of Category III schools would result in excessive church-state entanglement in violation of the Establishment Clause.

The Category III schools, in their cross-appeal, argue that the court below erred in rejecting their Free Exercise

claims and their claim that, both the eligibility determination process and the administrative relationship between religious schools and the state created by the statutory scheme results in unconstitutional entanglement with religion. They continue to assert their equal protection claim as well.

ARGUMENT

DISPARATE TREATMENT OF CHURCH-AFFILIATED RELIGIOUS SCHOOLS AND RELIGIOUS SCHOOLS OPERATED WITHOUT CHURCH AFFILIATION VIOLATES THE RELIGION CLAUSES OF THE FIRST AMENDMENT

The court below ruled in essence that religious schools that are part of the corporate structure of a church (Category I schools) and religious schools that are directly affiliated with a church

(Category II schools) are exempted, by statute, from the unemployment tax scheme. Those rulings are not challenged here. The court further held that religious schools that are not affiliated with a church (Category III schools) are within the statute's coverage, but that, because of excessive entanglement, that coverage is unconstitutional. That holding is challenged by the federal and state parties.

The amicus takes no position on the question whether the entanglement which coverage gives rise to violates the Establishment Clause. The amicus does urge, however, that inclusion of Category III schools is unconstitutional, without regard to issues of excessive

entanglement, because disparate treatment of religious schools solely based on their affiliation or lack of affiliation with a "church" violates the religion clauses of the First Amendment. This disparate treatment issue, not resolved by the court below, was characterized by that court as a question of equal protection. The amicus believes that both the equal protection guarantees and the religion clauses of the Constitution are implicated, but that the issue is best resolved by reference to the religion clauses.

Undoubtedly, not all regulation of the activities of religious institutions, or of religious schools, is proscribed by

the religion clauses of the First Amendment.

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church ... [O]ur State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception.

Roemer v. Board of Public Works, 426 U.S. 736, 745 (1976).

At the same time, the Free Exercise and Establishment Clauses do operate to place limits on the scope and nature of state regulation of religious activities. Under those clauses, "a hermetic separation" of church and state may not be required, id. at 746, but "scrupulous neutrality by the State as among

religions" is, id. at 745.

Just as reasonable time, place, and manner restrictions which serve significant governmental interests and which apply in an "even-handed," non-discriminatory fashion "to all alike" may not offend the free speech guarantees of the First Amendment, see Heffron v. International Society for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981), even-handed, non-discriminatory regulation of certain operational aspects of religious schools may, under some circumstances, exist without offense to the religion clauses. Conversely, statutory obligations affecting the

activities of religious schools which are not evenhanded, which do not apply to all alike, and which are discriminatory either on their face or as applied are forbidden.

This neutrality principle lies at the very core of the First Amendment's religious guarantees. "[R]eligious gerrymanders," a clear violation of the neutrality rule, cannot be tolerated. Walz v. Tax Commission, 397 U.S. 664, 696 (1970) (opinion of Harlan, J.); Gillette v. United States, 401 U.S. 437 (1971). Quite simply, "[i]f the purpose or effect of a law ... is to discriminate invidiously between religions, that law is constitutionally invalid ...." Braunfeld v. Brown, 366 U.S. 599, 607 (1961). The

unemployment compensation law, as construed, does just that.

The federal government concedes, as it surely must, that the statute, as construed, results in the disparate treatment of Category III schools and church-affiliated schools. Addressing the issue as if it were merely one of equal protection, it argues that that disparate treatment is constitutional because there is a rational basis for the statutory classification.

The amicus contends that the rational bases urged by the government in support of the classification are insufficient to save the statute. They are not rational and, in any event, where sensitive First Amendment rights are

concerned mere rationality is not enough. More importantly, the distinctions proposed by the government are truly distinctions without a difference.

Separately incorporated Christian schools, like those of plaintiffs here, are no less religious in their beliefs, teachings, practices, or operations, and are no less an integral part of the religious mission of the Christian faith, than their church-affiliated counterparts. See Comment, Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues, 25 Villanova L. Rev. 69, 94 & n.201 (1979-80). By imposing unemployment compensation obligations on the first category of schools and not on

the second, the government has discriminated impermissibly against the former. Christian School Ass'n v. Comm., 55 Commw. Ct. 555, 423 A.2d 1340 (Pa. 1980).

The government claims that the legislative classification is rational and has hypothesized several grounds which purportedly justify it:

> First, church-run schools are more likely to have a strong and specific religious orientation than interdenominational schools or those established and run by laity. Second, the risk of church-political entanglement is greater when church-controlled schools are involved. See Lemon v.

> Kurtzman, supra, 403 U.S. at 622-623; Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 794-798 (1973). Third, there is a greater likelihood that employees of church-controlled schools will be provided with non-governmental assistance, through church relief programs, for economic hardships caused by unemployment. Finally, the distinction is practical to administer. It is relatively easy to determine whether a particular school is church-controlled, but may be very difficult to determine whether it is sufficiently "religious" to qualify for exemption as a Category III school.

None of these distinctions is valid.

First, there is no factual support for the government's claim that church-run schools are more likely to have a strong religious mission than non-church affiliated religious schools. Indeed, the findings of the court below are to the

contrary; the district judge found as a fact that the schools are "virtually indistinguishable" in religious mission. Accord, Christian School Ass'n v. Comm., supra, 55 Commw. Ct. at ____, 423 A.2d at 1346-47.

As to the government's second contention -- that the risk of church-political entanglement is greater when church-controlled schools are involved — the proposition is true only so long as the word "church" in the phrase "church-political entanglement" is read narrowly to mean denomination or sect. When "church" is read broadly to mean an institution which carries out religious functions, as it must, see, e.g., Young

Life Campaign v. Director, 122 Cal. App. 3d 559, 176 Cal. Rptr. 23 (3d Dist. 1981) the government's claim is nonsensical.*

The government's third ground for distinguishing between Category III and church-affiliated schools is equally flawed. The assertion that there is a greater chance that employees of the latter will be provided with

* The government may be suggesting that the risk of political divisiveness along religious lines is most acute when church-controlled groups are involved; its citations to Lemon and Nyquist support this reading. To the extent that the government is asserting that non-affiliated religious schools have less political clout or a smaller constituency than the affiliated schools, the ground is

non-governmental assistance, "through church relief programs," for economic hardship incident to unemployment appears to be sheer ipse dixit. Amicus knows of no data, and the government cites none, which tend to support that statement.

(con't)
patently invalid as a justification for upholding the legislative classification. Discrimination against the politically powerless is less tolerable because it is not likely to be corrected by the democratic process, though it is surely more likely than discrimination against the powerful. Moreover, given the recent growth of Christian schools — both church-affiliated and independent - the government may be seriously underestimating the political strength of, and popular loyalty towards, the non-affiliated schools.

Finally, the government's claim that the statutory distinction is "practical to administer" because it is easier to determine whether a particular school is church-controlled than whether it is sufficiently religious to qualify for exemption surely cannot save the legislative classification. First, of course, in order to qualify for exemption under Section 3309(b)(1)(B) a school must demonstrate not only that it is operated, supervised, controlled or principally

supported by a church or ... association of churches", but also that it is "operated primarily for religious purposes." Thus, whether a particular school is operated primarily for religious purposes — the "more difficult" question -- must be determined anyway in ascertaining entitlement to exemption of Category II schools. That inquiry is no different with respect to Category II and Category III schools.

In any event, we believe the government is wrong in characterizing the question of control as an easy one. In some cases, it may be relatively simple to ascertain whether a school is affiliated with a church or whether it is not. See, e.g., Employment Division v. Northwest

Christian College, 31 Or. App. 201, 570 P.2d 100 (1977); Employment Division v. Archdiocese of Portland, 42 Or. App. 421, 600 P.2d 926 (1979). But the easy cases are limited to those where "church" is defined narrowly and in terms of traditional preconceptions about religion. This Court has recently written that "[t]he determination of what is a religious belief or practice is more often than not a difficult and delicate task." Thomas v. Review Board of the Indiana Employment Security Division, 101 S. Ct. 1425, 1430 (1981). The determination of what is a "church" is an equally sensitive

task. See generally, Young Life Campaign v. Director of Employment, supra. (Christian youth organization with no official connection with any denominational church body, which declined to hold itself out as a church because those whom it sought to reach reacted negatively to traditional churches, which used clergy ordained by traditional churches, and which encouraged affiliation with traditional churches was nonetheless a church within the meaning of Cal. Unemp. Ins. Code §634.5). See also Whelan,

Church in the Internal Revenue Code: The Definitional Problems, 45 Fordham L. Rev. 885 (1977) [hereinafter Definitional Problems].*

* Indeed, the First Amendment may well require that non-affiliated sectarian schools themselves be regarded as "churches."

> It could be argued that ... parents who own, control, and principally support a church constitute a church. While the parents involved in Christian schools may not all be members of the same local congregation of worshippers, they tend to share common religious goals and ideals, meet regularly, and engage corporately in worship and other religious activities.

Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws, supra, at 94, n.198.

Even where traditional churches are involved, given the variety of ways in which church-affiliated religious schools are organized and operated, a function of the myriad ways in which different churches, synagogues and congregations are themselves organized, the question of "control" is not necessarily an easy one. Indeed, where religious organizations are concerned, true "control" may be more a matter of moral suasion and tradition, than a function of corporate, legal controls or financial strings. Cf. NLRB v. Bishop Ford Central High School, 623 F.2d 818, 824 (2d Cir. 1980), cert. denied, 101 S. Ct. 1698 (1981) (separately incorporated Roman Catholic high school not subject to jurisdiction of NLRB; "The position of the Board that Ford Central is

a legal entity 'separate and distinct from the Church' is ... irrelevant and in any event not accurate. Ford Central is only conditionally separated from the diocese and the condition imposed is continuing allegiance and loyalty to the Church"); Employment Div. v. Northwest Christian College, supra (theology school with independent board under control of Church); Ritter v. Mt. St. Mary's College, 495 F.Supp. 724 (D.Md. 1980) (independent Catholic college).

But even if the government's contentions were logical and factually supportable, the fact remains that, precisely because there is a "great diversity in church structure and

organization among religious groups in this country," St. Martin Evangelical Lutheran Church v. South Dakota, supra, 101 S. Ct. at 2142, n.12, the statutory classification necessarily operates capriciously and discriminatorily on the basis of the beliefs and resulting organizational structures of the various religions.

> ... American churches have diverse, complex and confused structures. They are more like molecules than atoms. Moreover, each church has a double structure: one internal, in its own ecclesiastical law, and the other external, in American civil law.
>
> In their own ecclesiastical law, some of the American churches are congregational in structure; others are hierarchical ...

In the congregational churches, the faith and internal religious law of the denominations make each local congregation autonomous. The coordination of the various congregations' activities is a matter of voluntary agreement or "covenant." Each local congregation is usually a separate civil law corporation or trust. The local congregations establish still other civil law corporations or trusts to carry on the activities, such as the maintenance of a seminary or the propagation of the faith at home or abroad, that they have agreed to carry on in common ....

In the hierarchical churches ... the faith and internal religious law create a single church authority with jurisdiction over all the members and branches of the church. Local congregations are divisions, not autonomous units ...

Regardless of their congregational and hierarchical structure, all of the American churches employ a multitude of civil law corporations and trusts to carry on their functions of worship, preaching, educating, healing and otherwise caring for the spiritual and corporal needs of their own members and of the general public. The

> churches have created uncounted thousands of civil law corporations and trusts for a variety of legal, historical and ecclesiastical reasons.

Definitional Problems, supra, at 903-4.

Given the structure of the Catholic Church, most Catholic parochial schools will undoubtedly be exempt from the unemployment compensation scheme as it stands. But cf. NLRB v. Bishop Ford Central Catholic High School, supra. The same may be true for the Lutheran schools of this nation. See L. Pfeffer & A. Stokes, Church & State in the U. S. 419 (1964); St. Martin Evangelical Lutheran Church v. South Dakota, supra.

In contrast, most, but not all, Jewish schools would be subject to the unemployment laws, for the typical Jewish day school is conducted under non-congregational auspices.

> In 1962, 86.3 percent of [such] schools outside New York were non-congregational; 11.7 percent were congregational; and 20 percent were inter-congregational. In Greater New York about 85 percent of the schools are non-congregational.

A. I. Schiff, The Jewish Day School in America 100 (1966).

At least where the Jewish schools are concerned, coverage or non-coverage will be particularly capricious since, whether an individual religious school is affiliated with a particular synagogue or congregation or group of synagogues or congregations, or whether it exists without any such affiliation is largely a matter of historical accident. An individual school's corporate identity and formal relationship with a synagogue or

association of synagogues is a function of such factors as the personality and affiliation of its founders, financial or funding considerations, and space availability. It has little or nothing to do with the religious nature or function of the schools. See generally, A. Schiff, supra, passim (describing founding and development of particular Jewish day schools). Indeed, it is not unusual for individual orthodox Jewish schools to have spun off their own congregations (i.e., synagogues). Under these circumstances, the distinction between affiliated and non-affiliated schools is truly meaningless.

Religious groups "maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body would deny this is an affirmative if not dominant policy of church schools." Walz v. Tax Commission, 397 U.S. 664, 671 (1970). That being the case, the distinction between churches and church-related schools is ultimately an unworkable and a non-productive one. "A church is more than merely an edifice affording people the opportunity to worship God." Matter of Community Synagogue v. Bates, 1 N.Y. 2d 445, 453, 154 N.Y.S. 2d 15,21,136 N.E. 2d 488, 493 (1956). Rather, it is a community of persons carrying out a

perceived religious mission through a variety of ministries, often including educational ones.

Likewise, the distinction between church-related religious schools and non-affiliated religious schools is an untenable one. Both are, in fact, constitutionally indistinguishable from "churches" — both are indeed "churches" — so both must be treated alike. Disparate treatment is necessarily irrational, arbitrary and capricious. Because the statute's classifications result in different treatment of religious organizations which have "equal status" under the Firt Amendment, the statute is constitutionally infirm.

CONCLUSION

For the reasons stated, this Court should hold that neither the federal nor state governments may distinguish, for purpose of unemployment insurance coverage, between those religious schools which are church affiliated and those which are not.

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